STATE OF MICHIGAN

COURT OF APPEALS

ORA SETTA, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED July 27, 2006
v	No. 267397 Macomb Circuit Court
LEO DAVID KONDZIOLKA and CITY OF WARREN, Defendants-Appellees/Cross-Appellants.	LC No. 2003-003993-NI

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Plaintiff, seventy-eight-year old Ora Setta, appeals as of right from a trial court order granting summary disposition in favor of defendants Leo Kondziolka and the city of Warren pursuant to MCR 2.116(C)(7) in this automobile accident case.[1] Defendants cross-appeal the same order, arguing that plaintiff, as a matter of law, has not suffered a serious impairment of a body function resulting from the accident. Because the trial court properly excluded expert testimony and determined that plaintiff could not demonstrate that her injuries "result[ed] from" the accident, MCL 691.1405, summary disposition based on governmental immunity was proper. We therefore affirm.

This action stems from an automobile accident that occurred on April 25, 2002, in the city of Centerline. The accident occurred near a traffic signal at Eleven Mile Road and Van Dyke. While coming to a stop at a red light, a city garbage truck driven by city employee Leo Kondziolka struck a vehicle that then hit plaintiff's vehicle. Plaintiff was eventually treated by Martin Kornblum, M.D., an orthopedic surgeon, and Bal K. Gupta, a psychiatrist. Plaintiff alleged that she received numerous injuries to her back, neck, and shoulder. Plaintiff also contended that she suffered from depression subsequent to the accident and that all of these

[1] The trial court granted summary disposition in favor of Kondziolka on the basis that plaintiff failed to show gross negligence as required under MCL 691.1407(2)(c). Plaintiff has not appealed this aspect of the trial court's decision. Although this opinion refers generally to both defendants, the issue of governmental immunity under MCL 691.1405 pertains solely to defendant city of Warren.

injuries amounted to a serious impairment of body function resulting from the negligent operation of the garbage truck. The trial court granted defendant's motion for summary disposition pursuant to 2.116(C)(7) on the basis of governmental immunity.

We review de novo a trial court's grant of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. When determining whether summary disposition is appropriate under MCR 2.116(C)(7), this Court "consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). If there is no dispute regarding the facts, and reasonable minds could not differ concerning their legal effect, the question of immunity becomes a question of law. *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003).

Defendants argue that the city of Warren is immune from tort liability and is not subject to the motor vehicle exception to governmental immunity because plaintiff has not brought forth any evidence showing that her injuries "result[ed] from" the accident. Defendants contend that plaintiff's medical conditions were preexisting, as shown by plaintiff's failure to present any admissible evidence that her injuries were a result of the 2002 accident, and by the opinions of other physicians who opined that plaintiff's medical conditions were degenerative.

Generally, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The motor vehicle exception to governmental immunity, MCL 691.1405, provides an exception to immunity for injuries "*resulting from* the negligent operation by any . . . employee of the governmental agency, of a motor vehicle of which the government agency is owner. . . ." (Emphasis added.) Exceptions to the broad grant of immunity should be construed narrowly. *Robinson v Detroit*, 462 Mich 439, 455; 613 NW2d 307 (2000).

In response to defendants' motion for summary disposition based on governmental immunity, plaintiff submitted the expert testimony of her physicians, Kornblum and Gupta. The trial court declined to consider the expert testimony, finding that the doctors' diagnoses were based on incomplete information and assumptions that were not a part of the record. The court held that plaintiff failed to provide any proofs showing that the alleged injuries resulted from the accident, and therefore, governmental immunity was appropriate.

On appeal, plaintiff argues that the expert testimony was improperly excluded because the expert opinions had a factual basis, which should have allowed the underlying issue to be determined by a jury. Plaintiff also disagrees with the trial court's reliance on *Curtis v City of Flint*, 253 Mich App 555; 655 NW2d 791 (2002), on the basis that the court broadened MCL 691.1405 to mean that bodily injury and property damage be solely caused by the negligent operation of a motor vehicle. That is, the trial court relied on *Curtis* in an attempt to establish a stricter standard for determining whether the plaintiff's condition "result[ed] from" the accident.

The trial court relied on *Curtis*, *supra* at 561, in noting that the motor vehicle exception permits recovery only for injuries "resulting from" the negligent operation of a vehicle, as opposed to injuries sustained under the lesser "but for" standard of causation. It was defendants' argument that plaintiff's injury did not "result[] from" the accident, and instead was a

degenerative condition that predated this accident. Therefore, *Curtis*, as applied by the trial court, provides only partial guidance in the present case because this Court need not scrutinize the term "resulting from," but must simply apply the clear language of the statute to this set of facts. Nonetheless, contrary to plaintiff's argument, the trial court did not misapply the holding in *Curtis* to broaden governmental immunity under MCL 691.1405.

Although MRE 703 is not explicitly mentioned by the trial court, it is clear that the expert testimony was excluded because it did not comport with the record or facts in evidence based on this evidentiary principle. The expert testifying concerning plaintiff's neck, shoulder, and back injuries, Dr. Kornblum, did not base his opinions on facts that were in the record, but on other assumptions that were offered by plaintiff. These assumptions were shown to be incorrect through proffered evidence including, for example, plaintiff's extensive prior history of injury, which was undisclosed to Dr. Kornblum. An expert must have a sufficient factual basis on which to base his opinions. *Thornhill v Detroit*, 142 Mich App 656, 658; 369 NW2d 871 (1985). Dr. Kornblum did not review past medical records and indicated that he would have to retract certain testimony if his assumptions were erroneous. Dr. Kornblum based his opinion on the assumption that the plaintiff was not treated for back pain in previous years, while the record clearly indicates that she has had extensive preexisting back, neck, and shoulder injuries related to those described after the accident.

The second expert, Dr. Gupta, maintained that plaintiff was suffering from depression because of the accident; however, his opinions were similarly uninformed and did not demonstrate that the symptoms "result[ed] from" the accident. Dr. Gupta admitted that he did not review past medical records. His opinion that some injuries did not predate the accident is not supported by any tendered evidence. Dr. Gupta testified, "Why I'm not saying [my diagnosis of a closed head injury is] a hundred percent, one is that, yes, she had an auto accident before. I don't know how much that may have to do. [sic] But, more so is the age factor. She could have early dementia itself."

This Court recognizes that an expert's opinion need not exclude all other factors of the cause of a plaintiff's injury; however, the expert must have an evidentiary basis for his own conclusions. *Mullholland v DEC Int'l Corp*, 432 Mich 395, 414; 443 NW2d 340 (1989). Dr. Gupta had no foundation to testify that plaintiff's condition was aggravated when he had very limited and flawed knowledge of the patient's original condition. Further, Dr. Gupta had incomplete information about previous psychological treatment resulting from a 1982 accident in which the plaintiff was injured. He conceded that he was surmising the cause of plaintiff's injuries on the basis of his knowledge of her recent surgeries. Dr. Gupta's opinions about the causation of depression and head injury were equivocal. Further, his opinions depended in large part on plaintiff's treatment, including surgeries, for her physical conditions, which, as noted above, were not shown to have resulted from the April 2002 accident.

After scrutinizing the record, we conclude that neither Dr. Kornblum nor Dr. Gupta's testimony was based on medical documentation or truthful representations from the plaintiff sufficient to support the experts' conclusions. The trial court did not abuse its discretion in excluding the expert testimony, which was the only evidence offered in response to defendant's motion for summary disposition.

The decision whether to exclude expert testimony is within the sound discretion of the trial court. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 214; 457 NW2d 42 (1990). The facts of a particular case on which an expert bases his testimony must be in evidence, but the trial court may receive expert opinion testimony subject to the later admission of the factual basis of the opinion. MRE 703; *Badiee v Brighton Area Schools*, 265 Mich App 343, 370; 695 NW2d 521 (2005). Expert testimony may be excluded when based on assumptions that do not comport with the established facts, *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999), or are derived from unreliable or untrustworthy data, *Tobin v Providence Hosp*, 244 Mich App 626, 651; 624 NW2d 548 (2001).

The expert opinions of Dr. Kornblum and Dr. Gupta, as presented, were inconclusive or defective, and therefore did not constitute admissible evidence that plaintiff's injuries were attributable to the 2002 accident. The substance or content of supporting proofs under MCL 2.116(C)(7) must be admissible in evidence. *Maiden, supra* at 119, 123. The expert testimony, viewed in a light most favorable to the plaintiff, is insufficient to generate a genuine issue of material fact regarding whether plaintiff's injuries "result[ed] from" the accident. *Id*. at 123 n 5.

The trial court did not err in determining that defendants were entitled to governmental immunity under MCL 691.1407. In light of our decision, we need not address whether plaintiff sustained serious impairment of a body function arising out of the accident.

Affirmed.

/s/ Jessica R. Cooper
/s/ Janet T. Neff
/s/ Stephen L. Borrello